

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES EARL HARVEY, aka Abdul O No C-08-2894 VRW (PR)  
Shakur.

**Plaintiff,**

V

## ORDER OF SERVICE

J PUENTE, et al,

**Defendant(s).**

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19 Plaintiff, a prisoner at Pelican Bay State Prison  
20 ("PBSP"), has filed a pro se first amended complaint under 42 USC  
21 section 1983 alleging eleven First Amendment claims. Specifically,  
22 plaintiff alleges that PBSP officials: refused to process outgoing  
23 mail with his Muslim name by confiscating approximately sixteen  
24 letters over a two month period (claim one); repeatedly confiscated  
25 his mail, writings and other written materials under the false  
26 pretext of being gang-related (claims two through seven); refused to  
27 allow him either to send mail to or receive mail for a period of two  
28 years from addresses PBSP officials identified as "drop boxes for a

1 prison gang" (claim eight); refused to deliver three individual  
2 writs to the Ninth Circuit (claim nine); intentionally destroyed an  
3 appeal filed pursuant to the inmate administrative grievance system  
4 (claim ten); and intentionally misdirected a piece of his mail to  
5 the New York office of the district attorney (claim eleven). Doc #9  
6 at 4-7. Plaintiff seeks damages.

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## II

9           Federal courts must engage in a preliminary screening of  
10 cases in which prisoners seek redress from a governmental entity or  
11 officer or employee of a governmental entity. 28 USC § 1915A(a).  
12 The court must identify cognizable claims or dismiss the complaint,  
13 or any portion of the complaint, if the complaint "is frivolous,  
14 malicious, or fails to state a claim upon which relief may be  
15 granted," or "seeks monetary relief from a defendant who is immune  
16 from such relief." Id § 1915A(b). Pleadings filed by pro se  
17 litigants, however, must be liberally construed. Balistreri v  
18 Pacifica Police Dep't, 901 F2d 696, 699 (9th Cir 1990).

19           To state a claim under 42 USC section 1983, a plaintiff  
20 must allege two essential elements: (1) that a right secured by the  
21 Constitution or laws of the United States was violated, and (2) that  
22 the alleged violation was committed by a person acting under the  
23 color of state law. West v Atkins, 487 US 42, 48 (1988).

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## A

26           In claim ten, plaintiff alleges that PBSP officials  
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1 violated his constitutional rights when they intentionally destroyed  
2 an appeal he filed pursuant to the inmate administrative grievance  
3 system. It is well-established that there is no constitutional  
4 right to a prison administrative appeal or grievance system, see  
5 Ramirez v Galaza, 334 F3d 850, 860 (9th Cir 2003); Mann v Adams, 855  
6 F2d 639, 640 (9th Cir 1988), and that a state's creation of a prison  
7 administrative appeal or grievance system does not implicate a  
8 liberty interest protected by the Due Process Clause, see Antonelli  
9 v Sheahan, 81 F3d 1422, 1430 (7th Cir 1996); Buckley v Barlow, 997  
10 F2d 494, 495 (8th Cir 1993) (same). Plaintiff's allegations set  
11 forth in claim ten regarding PBSP officials' intentional destruction  
12 of an appeal he filed pursuant to the inmate administrative  
13 grievance system fail to state a claim under section 1983 and that  
14 claim is DISMISSED. See id.

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16 B

17 In claims one through nine and eleven, plaintiff alleges  
18 that PBSP officials violated his constitutional rights by  
19 interfering with his mail delivery service. Prisoners enjoy a First  
20 Amendment right to send and receive mail. See Witherow v Paff, 52  
21 F3d 264, 265 (9th Cir 1995) (citing Thornburgh v Abbott, 490 US 401,  
22 407 (1989)). A prison, however, may adopt regulations or practices  
23 which impinge on a prisoner's First Amendment rights as long as the  
24 regulations are "reasonably related to legitimate penological  
25 interests." See Turner v Safley, 482 US 78, 89 (1987). The Turner  
26 standard applies to regulations and practices concerning all

1 correspondence between prisoners and to regulations concerning  
2 incoming mail received by prisoners from non-prisoners. See  
3 Thornburgh, 490 US at 413.

4 In the case of outgoing correspondence from prisoners to  
5 non-prisoners, however, an exception to the Turner standard applies.  
6 Because outgoing correspondence from prisoners does not, by its very  
7 nature, pose a serious threat to internal prison order and security,  
8 there must be a closer fit between any regulation or practice  
9 affecting such correspondence and the purpose it purports to serve.  
10 See Thornburgh, 490 US at 411-12. Censorship in such instances is  
11 justified only if: (1) the regulation or practice in question  
12 furthers one or more of the substantial governmental interests of  
13 security, order and rehabilitation; and (2) the limitation on First  
14 Amendment freedoms is no greater than necessary to further the  
15 particular government interest involved. See Procunier v Martinez,  
16 416 US 396, 413 (1974), overruled on other grounds, Thornburgh v  
17 Abbott, 490 US 401, 413-14 (1989); see, for example, Witherow, 52  
18 F3d at 265-66 (regulation requiring visual inspection of outgoing  
19 mail from inmates to certain public officials closely related to  
20 legitimate penological interest of preventing prisoners from  
21 disseminating harmful or offensive materials and avoids unnecessary  
22 intrusion) (emphasis added).

23 A district court reviewing whether a prisoner states a  
24 claim for the censorship of outgoing mail should not decide, on the  
25 pleadings, whether the alleged censorship is justified. See Barrett  
26 v Belleque, 544 F3d 1060, 1062 (9th Cir 2008) (per curiam) (holding

1 district court erred by dismissing complaint for failure to state a  
2 claim by deciding on the pleadings that censorship was justified).  
3 A prisoner complaint that unequivocally pleads facts alleging that  
4 prison officials censored his outgoing mail and punished him for its  
5 contents states a claim that is clearly cognizable under Procunier.  
6 Id.

7 The allegations set forth in claim nine regarding PBSP  
8 officials' failure to deliver three individual writ petitions to the  
9 Ninth Circuit also implicate plaintiff's constitutional right of  
10 access to the courts. See Lewis v Casey, 518 US 343, 350 (1996);  
11 Bounds v Smith, 430 US 817, 821 (1977). To establish a claim for  
12 any violation of the right of access to the courts, plaintiff must  
13 prove that there was an inadequacy in the prison's legal access  
14 program that caused him an actual injury. See Lewis, 518 US at  
15 350-55. To prove an actual injury, plaintiff must show that the  
16 inadequacy in the prison's program hindered his efforts to pursue a  
17 non-frivolous claim concerning his conviction or conditions of  
18 confinement. See id at 354-55.

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22 Liberally construed, plaintiff's allegations as to claims  
23 one through nine and eleven appear to state cognizable First  
24 Amendment claims under section 1983 and PBSP officials J Puente,  
25 Captain K Brandon, B Thornton, D E Milligan, Lieutenant Perry,  
26 Sergeant G. Stewart, D T Hawkes and Officer Beeson of the  
27 Institutional Gang Investigation Unit; Captains Kays and Yax of the  
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1 Investigation Services Unit; D Beard of the Security Squad; [First  
2 Name Unknown] Murphy of the Office of Correctional Safety; and Law  
3 Library Officer Murray will be served. Claim ten is DISMISSED under  
4 the authority of 28 USC section 1915A(b).

5 California Department of Corrections and Rehabilitation  
6 former directors C Terhune and M Cate, wardens Robert Horel, Joe  
7 McGrath and R. Kirkland, and associate warden Dillard are DISMISSED  
8 as defendants under the authority of 28 USC section 1915A(b) because  
9 they are sued only in their capacity as supervisors. It is  
10 well-established that there is no respondeat superior liability  
11 under section 1983, ie, there is no liability simply because one is  
12 responsible for the actions or omissions of another. See Taylor v  
13 List, 880 F2d 1040, 1045 (9th Cir 1989).

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### III

16 For the foregoing reasons and for good cause shown:

17 1. The clerk shall issue summons and the United States  
18 Marshal shall serve, without prepayment of fees, copies of: (1) the  
19 first amended complaint in this matter and all attachments thereto  
20 (Doc #9); (2) all exhibits attached to Doc ## 1, 4, 5, 6 and 11,  
21 which are copies of the appeals filed pursuant to the inmate  
22 administrative grievance system that are related to plaintiff's  
23 claims; and (3) copies of this order on PBSP officials J Puente,  
24 Captain K Brandon, B Thornton, D E Milligan, Lieutenant Perry,  
25 Sergeant G. Stewart, D T Hawkes and Officer Beeson of the  
26 Institutional Gang Investigation Unit; Captains Kays and Yax of the

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1 Investigation Services Unit; D Beard of the Security Squad; A Murphy  
2 of the Office of Correctional Safety; and Law Library Officer  
3 Murray. All other named defendants are DISMISSED. The clerk also  
4 shall serve a copy of this order on plaintiff.

5 2. In order to expedite the resolution of this case, the  
6 court orders as follows:

7 a. No later than 90 days from the date of this  
8 order, defendants shall file a motion for summary judgment or other  
9 dispositive motion. A motion for summary judgment shall be  
10 supported by adequate factual documentation and shall conform in all  
11 respects to Federal Rule of Civil Procedure 56, and shall include as  
12 exhibits all records and incident reports stemming from the events  
13 at issue. If defendants are of the opinion that this case cannot be  
14 resolved by summary judgment or other dispositive motion, they shall  
15 so inform the court prior to the date their motion is due. All  
16 papers filed with the court shall be served promptly on plaintiff.

17 b. Plaintiff's opposition to the dispositive motion  
18 shall be filed with the court and served upon defendants no later  
19 than 30 days after defendants serve plaintiff with the motion.

20 c. Plaintiff is advised that a motion for summary  
21 judgment under Rule 56 of the Federal Rules of Civil Procedure will,  
22 if granted, end your case. Rule 56 tells you what you must do in  
23 order to oppose a motion for summary judgment. Generally, summary  
24 judgment must be granted when there is no genuine issue of material  
25 fact - that is, if there is no real dispute about any fact that  
26 would affect the result of your case, the party who asked for

1 summary judgment is entitled to judgment as a matter of law, which  
2 will end your case. When a party you are suing makes a motion for  
3 summary judgment that is properly supported by declarations (or  
4 other sworn testimony), you cannot simply rely on what your  
5 complaint says. Instead, you must set out specific facts in  
6 declarations, depositions, answers to interrogatories, or  
7 authenticated documents, as provided in Rule 56(e), that contradicts  
8 the facts shown in the defendant's declarations and documents and  
9 show that there is a genuine issue of material fact for trial. If  
10 you do not submit your own evidence in opposition, summary judgment,  
11 if appropriate, may be entered against you. If summary judgment is  
12 granted, your case will be dismissed and there will be no trial.  
13 Rand v Rowland, 154 F3d 952, 962-63 (9th Cir 1998) (en banc) (App  
14 A).

15 Plaintiff also is advised that a motion to dismiss for  
16 failure to exhaust administrative remedies under 42 USC section  
17 1997e(a) will, if granted, end your case, albeit without prejudice.  
18 You must "develop a record" and present it in your opposition in  
19 order to dispute any "factual record" presented by the defendants in  
20 their motion to dismiss. Wyatt v Terhune, 315 F3d 1108, 1120 n14  
21 (9th Cir 2003).

22 d. Defendants shall file a reply brief within 15  
23 days of the date on which plaintiff serves them with the opposition.

24 e. The motion shall be deemed submitted as of the  
25 date the reply brief is due. No hearing will be held on the motion  
26 unless the court so orders at a later date.

1           3. Discovery may be taken in accordance with the Federal  
2 Rules of Civil Procedure. No further court order is required before  
3 the parties may conduct discovery.

4           4. All communications by plaintiff with the court must  
5 be served on defendants, or defendant's counsel once counsel has  
6 been designated, by mailing a true copy of the document to  
7 defendants or defendant's counsel.

8           5. It is plaintiff's responsibility to prosecute this  
9 case. Plaintiff must keep the court and all parties informed of any  
10 change of address and must comply with the court's orders in a  
11 timely fashion. Failure to do so may result in the dismissal of  
12 this action pursuant to Federal Rule of Civil Procedure 41(b).

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15           **IT IS SO ORDERED.**

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18           VAUGHN R WALKER  
19           United States District Chief Judge

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